2010 WL 4077525 (Mich.) (Appellate Brief)
Supreme Court of Michigan.

Lori CALDERON, as Guardian of Arthur Krumm, a Legally
Incapacitated Person, Plaintiff/Counter-Defendant/Appellee,
and
Functional Recovery, Inc., a Michigan corporation, Intervening Plaintiff/Appellee,
v.
AUTO-OWNERS INSURANCE COMPANY, a Michigan corporation, Defendant/Counter Plaintiff/Appellant.

No. 138805.
2010.

Court of Appeals No. 283313 Wayne County Circuit Court No. 06-602100-NF

**Appellees' Joint Brief in Opposition to Defendant/Counter-Plaintiff/
Appellant Auto-Owners Insurance Company's Application for Leave to Appeal**

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*IV *ORDER BEING APPEALED*

Defendant-Appellant seeks leave to appeal the March 24, 2009 Opinion of the Michigan Court of Appeals, [1] wherein the trial court's Order Granting Defendant Auto-Owners Insurance Company's Motion for Summary Disposition Pursuant to MCR 2.116 (C)(10), entered on July 30, 2007, by the Honorable John A. Murphy of the Wayne County Circuit Court, was reversed and this case remanded for trial. Defendant-Appellant claims in their application that this case meets the criteria for review by this Court set forth in both MCR 7.302 (B)(3) and (5). Plaintiff-Appellees disagree and argue that for the reasons stated herein, this matter is not suitable for review in the this Court. Accordingly, Plaintiff-Appellees pray that Defendant-Appellant's application for leave be DENIED.

*v *COUNTER STATEMENT OF QUESTIONS INVOLVED*

I. SHOULD THIS COURT DENY DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL WHEN THEY FAIL TO SHOW ANY OF THE “GROUNDS” ENUMERATED IN MCR 7.302 (B)(3) AND (5) REQUIRED FOR GRANTING LEAVE?

Plaintiff-Appellees' answer, “YES.”

Defendant-Appellant would answer “NO”

II. DID THE COURT OF APPEALS REACH THE PROPER RESULT IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF DEFENDANT AND REMANDING THIS ISSUE FOR TRIAL WHEN:

A. Viewing all the evidence in a light most favorable to the Plaintiff, a reasonable juror could find that Arthur Krumm was domiciled in the home of Beverly Krumm in Fife Lake, Michigan; and

B. Determination of domicile is a question of fact for a jury unless the underlying facts are undisputed wherein it becomes a question of law?

Plaintiff-Appellees answer, “Yes”

Defendant-Appellant answers, “No”

*VI *COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS*

Plaintiff/Counter-Defendant/Appellee, Lori Calderon is the sister and legal guardian of her catastrophically injured brother, Arthur Krumm. On January 23, 2006, Ms. Calderon filed suit against Auto-Owners Insurance Company on behalf of her brother, claiming entitlement to Michigan no-fault benefits and underinsured motorist benefits stemming from an auto accident that occurred in North Carolina on May 17, 2003.

Plaintiff-Appellant Calderon alleged in her Complaint that at the time of the accident, Arthur was domiciled in the Michigan household of his grandmother (technically, adoptive mother), Beverly Krumm, and thus was entitled to payment of benefits under her policy issued by Auto-Owners. Defendant-Appellant responded with allegations that Arthur Krumm was not domiciled in Michigan at the time of the accident, and thus he is not entitled to benefits under the policy. Further, Defendant-Appellant countersued for re-payment of the substantial sum of benefits already paid on behalf of Arthur Krumm.

On November 15, 2006, Functional Recovery, Inc. intervened as a Plaintiff, claiming entitlement to payment from Auto-Owners for accident related medical services and treatment rendered to Mr. Krumm. The claims of Functional Recovery, Inc. are entirely derivative of Arthur Krumm's entitlement to benefits, and thus are equally affected by the outcome of the case. Plaintiff Lori Calderon, and Intervening Plaintiff Functional Recovery, Inc., are hereinafter collectively referred to as “Plaintiff-Appellees.”

Throughout the course of discovery, numerous depositions and statements were taken; intricate investigations into the pre-accident life of Arthur Krumm were conducted; and the result was, a mountain of evidence. Defendant-Appellant neatly lined up the evidence in its favor, and ***vii** brought a motion for summary disposition pursuant to MCR 2.116 (C)(10), arguing that Arthur Krumm was not domiciled in his grandmother's house, that he was in fact domiciled in Arkansas at the time of the accident, and that there existed no genuine issues of material fact. Thus, they were entitled to summary disposition as a matter of law.

Plaintiff-Appellees lined up their own arsenal of evidence, countering every one of Defendant's points of contention with regard to domicile. They argued that Arthur intended to return, and was in fact on his way to Michigan on the date of the accident. He had abandoned any residence he may have had in Arkansas, and had not established any domicile in North Carolina. When all the evidence was viewed in a light most favorable to the Plaintiffs, there were clearly issues of material fact, and summary disposition in favor of either party was inappropriate, as domicile is an issue of fact to be left to the jury.

Relying heavily on an affidavit from a resident of Colorado (one who was never deposed) presented by Defendant, the trial court substituted its judgment for that of a jury's and ruled as a matter of law that Arthur Krumm was not domiciled with his grandmother at the time of the accident.[2] The Court granted Defendant's motion, and on July 30, 2007 entered an order dismissing Plaintiff's claims, as well as those of Intervening Plaintiff, Functional Recovery Inc.[3]

Following the grant of Defendant's motion, the parties agreed to a dismissal without prejudice of Defendant's counter claim, so that Plaintiffs could appeal the trial court's decision. An Order to this effect was entered on October 12, 2007. Because the Court of Appeals refused ***viii** to recognize the stipulated dismissal without prejudice as a final order, a second stipulated order dismissing all claims with prejudice was entered by agreement of the parties on January 7, 2008. Having a final order, Plaintiff-Appellees then appealed the trial court's dismissal of their claims.

The Court of Appeals originally informed the parties, that the appeal would be submitted to the court on February 10, 2009, without oral argument pursuant to MCR 7.214(E). However, on February 11, 2009, the court entered an Order directing the

parties to appear on March 11, 2009 for abbreviated oral argument, apparently to clarify some issues. The parties appeared, and oral argument was heard. Subsequently, Judges Donofrio, Kelly and Beckering by Per Curiam opinion, reversed the decision of the trial court and remanded this matter for trial holding that the trial court "impermissibly usurped the role of the jury when it decided this factual question and issues of witness credibility as a matter of law," and as a result "erred when it concluded that plaintiff had not shown there was a question of fact regarding whether Plaintiff's legally incapacitated person, Arthur Krumm, was domiciled at his grandmother's house at the time of the accident."

Auto-Owners Insurance Company responded with an application for leave to appeal to the Supreme Court, and Plaintiff-Appellees now urge this Court to reject their application.

*IX *STANDARD OF REVIEW*

Plaintiff-Appellees generally agree with the standard of review as stated by the Defendant-Appellants, with one exception. MCR 7.302(B)(5) requires that one of **two** criteria be met. The actual wording of the rule does not set forth three separate criteria as is suggested by Defendant-Appellant. The subsection of the rule states that an application must show that the decision of the Court of Appeals was "clearly erroneous **and** will cause material injustice," or "that the decision conflicts with a Supreme Court decision..." That's two optional criteria, not three.

Apart from meeting the criteria for review set forth within the relevant court rule, Plaintiff-Appellees agree that the standard of review of a motion for summary disposition pursuant to MCR 2.116 (C)(10) is *de novo. Spiek v Dept of Transportation,* 456 Mich 331, 337; 527 NW2d 201 (1998).

*1 *ARGUMENT*

I. THIS COURT SHOULD DENY DEFEND ANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL BECAUSE THE APPLICATION FAILS TO SHOW THE "GROUNDS" FOR REVIEW SET FORTH IN MCR 7.302 (B)(3) AND (5) AS IS ALLEGED WITHIN THE APPLICATION.

This is a dispute over the "domicile" of an occupant of a motor vehicle involved in an accident on May 17, 2003 in the State of North Carolina. The determination of the issue of domicile will result in the payment or denial of no-fault benefits from the Michigan Catastrophic Claims Fund pursuant to the Michigan No-Fault Automobile Insurance Act, MCL 500.3101 et seq. It is Plaintiff-Appellees' position that the catastrophically injured ward, Arthur Krumm, was domiciled in the home of his Grandmother (adoptive mother) Beverly Krumm in Fife Lake, Michigan at the time of the accident. Defendant-Appellant in their motion as presented to the trial court alleged that Mr. Krumm was domiciled in Arkansas at the time of the accident.

Michigan Court Rule 7.302(B) states the grounds for granting leave to appeal a decision of the Court of Appeals to the Michigan Supreme Court. Defendant-Appellant asserts within their application for leave to appeal, that they have shown the grounds enumerated in subsections 3 and 5 specifically. The rule reads in pertinent part:
(B) Grounds. The application must show that

...

(3) the issue involves legal principles of major significance to the state's jurisprudence; and

...

(5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice, or the decision conflicts with a Supreme Court decision, or another decision of the Court of Appeals.

***2** Plaintiff-Appellees argue that Defendant-Appellant has failed to show these grounds as is required by the court rule and thus the application should be denied.

A. THE ISSUE OF DETERMINING DOMICILE IS NOT OF "MAJOR" LEGAL SIGNIFICANCE AS CONTEMPLATED BY THE RULE.

Although the issue of domicile as is relevant to no-fault automobile insurance law cannot be said to be insignificant to this State's jurisprudence, it should not be considered of "major" significance either. Domicile for the most part is not a particularly difficult concept. Most of us have only one place we call home, i.e. one place where we intend to reside, and can reasonably prove our assertion. Domicile, becomes an issue in a relatively small number of cases; those that involve a no-fault claimant who is in some sort of transitory phase of his life, a claimant who is in-between. Further, even if the concept of domicile could be considered of major significance, this is not the right case or context to decide the matter. Review of this factually complicated and highly disputed matter, will do little to add clarity to the existing guidelines for determining domicile previously dictated by this Court in *Workman v DAIIE*, 404 Mich 477, 274 NW2d 373 (1979), and expanded by the Court of Appeals in *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 333 NW2d 322 (1983). There are existing guidelines for determining domicile, and Defendant-Appellant has not proposed that they be changed or altered in any way, merely that the application of those guidelines can only result in a finding that the Plaintiff-Appellee's ward was not domiciled in Michigan.

B. THE COURT OF APPEALS DECISION IS NOT CLEARLY ERRONEOUS CAUSING MATERIAL INJUSTICE, NOR DOES IT CONFLICT WITH OTHER CASE LAW.

Defendant-Appellant and Plaintiff-Appellees' present two very different sides to the ***3** same story that is the life of Arthur Krumm. Because Mr. Krumm is unable to tell his story himself, the testimony of others who knew him at the time of the accident comes into play. It is this necessary reliance on the testimony of other individuals with relevant information that has in part made the determination of his domicile so complicated. In the end, the relevant facts and circumstances of this case are numerous and highly disputed. In granting Defendant's motion for summary disposition on the issue of Mr. Krumm's domicile at the time of the accident, the trial court judge failed to view all the evidence presented in a light most favorable to the Plaintiff, and inserted his own judgment as to witness credibility. The Court of Appeals in reversing the decision of the trial court merely returned the issue to its proper place before a jury.

The Court of Appeals decision to allow a jury to view the evidence and determine the issue of domicile, did not equate clear error resulting in material injustice. It is important to perceive that the Court of Appeals made no judgment as to what factors contribute to the determination of domicile, only that given the evidence before the trial court, there was a material dispute that belonged before a jury. This return to a jury of the determination of issues stolen by a trial court judge, cannot be said to result in material injustice as is claimed by Defendant-Appellants. The right to have one's case heard and judged by a jury of peers is at the heart of our system of justice, and it is in taking that right away wherein the injustice occurs.

Defendant-Appellant seems to allude to the idea that the material injustice will result from Arthur Krumm having his medical expenses paid by the catastrophic claims fund when he was not a resident of this State. That the payment of his expenses amounts to a crime against other drivers who pay no-fault premiums. Aside from the fact that this argument is full of holes, ***4** Defendant-Appellant is jumping the gun. That is not the result of the Court of Appeals opinion. The result of the reversal is only that Plaintiff-Appellees will get to present their version of the facts, adequately supported by wholly admissible evidence, to a jury, and not that Arthur Krumm's medical expenses will be paid.

Lastly, Defendant-Appellant claims that the decision of the Court of Appeals conflicts with existing case law. In order to illustrate this point, they draw comparisons between the facts of relevant existing cases and their version of the facts in this case. The problem with this is that the Court of Appeals did not decide the domicile issue as to Arthur Krumm. They did not reverse

and enter judgment in favor of Plaintiff, the Court of Appeals reversed and remanded the issue for trial. The Court of Appeals opinion merely stands for the fact that the three judges, specifically Judge Donofrio, Judge Kelly and Judge Beckering, believe that reasonable jurors, when hearing the evidence as presented in drastically different lights by both the Plaintiffs and Defendant could come to different conclusions on matters that are relevant to determining domicile, and thus the final determination rightfully belongs to a jury, and not a trial judge. This notion does not conflict with any other precedential opinion, and in fact adheres to the direction of precedent dictating that when underlying facts are in dispute, the question of domicile is a question of fact for a jury. *Fowler v Auto Club Ins Assoc*, 254 Mich App 362, 656 NW2d 856 (2003), and MCR 2.116(C)(10).

For these reasons, it is a sensible conclusion that this Court's valuable time and resources are more productively spent elsewhere, and Defendant-Appellant's application for leave should be DENIED.

***5 II. THE COURT OF APPEALS REACHED THE PROPER RESULT IN REVERSING THE TRIAL COURT'S GRANT OF SUMMARY DISPOSITION IN FAVOR OF DEFENDANT AND REMANDING THIS ISSUE FOR TRIAL.**

Defendant-Appellant spends a considerable amount of space pointing out that a trial court judge can determine, given the evidence in front of him, that no reasonable juror could find for a particular party, and grant or deny summary disposition accordingly. Plaintiff-Appellees do not dispute this contention. However, there is more to it. When a trial court judge hears a motion for summary disposition and makes a determination as a matter of law that reasonable jurors could only find for one party, he is still duty bound to view things in a light most favorable to the Plaintiff, and the trial court judge failed to do so here.

A. VIEWING ALL THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE PLAINTIFF, AND AS IT WAS PRESENTED TO THE TRIAL COURT, A REASONABLE JUROR COULD FIND THAT ARTHUR KRUMM WAS DOMICILED IN THE HOME OF BEVERLY KRUMM IN FIFE LAKE, MICHIGAN.

The term “domicile” has a meaning within the confines of the no-fault statute distinct from “presence” or “residence.” There has been significant litigation with regard to the issue of domicile, and a body of relevant case law has developed. In *Workman v DAIIE*, 404 Mich 477, 274 NW2d 373 (1979), the Michigan Supreme Court enumerated the following four factors in deciding whether a relative is in fact domiciled in the same household as a policy holder:

1. The person's subjective intent to remain either permanently or indefinitely in the insured's household;

2. The formality or informality of the relationship between the person claiming domicile and other member of the household;

3. The location of the person's living quarters in the same house or the same curtilage or premises as the insured; and

***6** 4. The existence of an alternative place of lodging by the person alleging domicile.

The factors were not meant to be exhaustive; and no one factor determinative. The analysis is to proceed on a case by case basis.

In the subsequent case of *Dairyland Ins Co v Auto-Owners Ins Co*, 123 Mich App 675, 333 NW2d 322 (1983), some additional factors were discussed and have since expanded the scope of the “domicile” analysis. The additional factors to be considered include:

5. The person's mailing address;

6. Whether the person maintains possessions at the insured's home;

7. Whether the insured's address appears on the person's drivers license;

8. Whether the person has a bedroom in the insured's home; and

9. Whether the person is dependant on the insured for **financial** support.

Again, the list is not m eant to be exhaustive, but is somewhat more comprehensive than the *Workman* factors alone. Despite the existence of these guidelines, any and all relevant factors should be considered when ascertaining domicile. *Montgomery v Hawkeye Security Ins Co,* 52 Mich App 456, 217 NW2d 449 (1974) As such, any evidence establishing these factors, is "material" to the determination of domicile.

At the time of the accident, Arthur Krumm was visiting friends in North Carolina. Plaintiff-Appellees do not dispute that immediately prior to traveling to North Carolina, Arthur Krumm had been physically present in Arkansas for a period of months. However physical presence does not necessarily equate domicile under the Michigan No-Fault Act, nor is domicile determined by mere absence from the State. *Warren v Board of Registration*, 72 Mich 398, 40 NW2d 553 (1888).

***7** It was Plaintiff-Appellees' contention that prior to the accident Arthur had been in Arkansas working here and there, partying, and returning to his home in Michigan every few weeks to refresh, and retool. At the beginning of May, he had decided it was time to go home, back to Michigan and his Grandmother's house. On the date of the accident, he had left Arkansas and was on his way to Michigan to live with his Grandmother, and thus he was domiciled within her home for purposes of accessing coverage under her no-fault insurance policy.

Despite some evidence that Arthur had spent an occasional night with his estranged wife while in Arkansas and may have helped her with the bills, a majority of the evidence indicates that he just drifted from place to place. It is clear that he had every intention of returning to Michigan; and his subjective intent is a factor in determining domicile. Because Arthur is unable to testify with regard to his subjective intent, one must rely on those who knew him to determine whether he intended to return to Michigan.

All of the witnesses deposed in this case to date that have occasion to know where Arthur Krumm resides, and where he was headed at the time of the accident, have testified that he planned to return to Michigan. Additionally, several of the deponents confirm that his home was with his Grandmother, Beverly Krumm. Plaintiff-Appellees offered to the trial court, the following relevant excerpts in support of this contention:

Deponent: LORI CALDERON

Lori testified by way of affidavit, that at the time of the accident she knew her brother's address to be 5529 Lund Rd. Fife Lake, Michigan. It was her belief that he was visiting friends in North Carolina at the time of the accident. (See Exhibit 1, Plaintiff's Motion Response, Sub- ***8** Exhibit G, Affidavit of L. Calderon) In a statement to an investigator hired by the Defendant, Ms. Calderon accounted a visit with her **brother at her Grandmother's in March of 2003,** just six weeks or so before the accident. (See Exhibit 1, Motion Response, Sub-Exhibit H, Report of Superior Investigative Services) Further, in her deposition taken November 27, 2006, she testified as follows:
Q. At the time of the accident do you recall where Artie was getting mail?

A. My grandmother's.

Q. Did you ever see any of the letters or envelopes or packages that came to him at your Grandmother's?

A. No. I mailed him stuff there.

...

Q. You also mentioned to the investigator that you believed Arthur intended to return home from North Carolina sometime in May, but you weren't sure as to what the exact date was. Is that your recollection now?

A. Yes.

(See Exhibit 1, Motion Response, Sub-Exhibit I, Deposition of Lori Calderon)

Deponent: BILL DUHAIME
Q. Do you know where he lived?

A. I guess if you would call living staying in this motel, this motel, shacking up with this girl, shacking up with that girl living, I guess you would call the Springdale /Fayetteville area.

...

Q. Is that -was that his lifestyle?

A. Yeah. I mean, I might see him today, and tomorrow he might be back at his grandmother's house for a week or two.

***9** Q. Did he go - did he go back to his grandmother's house

A. Yes.

Q. How would you know that he went to his grandmother's house?

A. Phone Records. You know, he'd call, and it would show up on the caller ID. It was from his grandmother's house you know.

Q. Did you ever call him at his grandmother's house?

A. Yes.

Q. Bill, was it your understanding that Arty's home was in Michigan?

A. Yeah, it was more than that, it was - you know

Q. Okay

A. Yeah, his grandmother's was his house.

Q. He kept - to your knowledge kept his belongings there?

A. Yes.

...

Q. Okay, Was it your understanding when he came down here it was to visit and work?

A. Yeah. Come down to work and hang out, party, do his thing, and go back home.

(See Exhibit 1, Motion Response, Sub-Exhibit C)

Deponent: LARRY CORBITT
Q. Larry, was it your understanding that Arty's home where he was always going to go back to was in Michigan?

A. Uh-huh.

Q. Okay

***10** A. I want to say his grandma.

Q. Right. Was - was he - did he ever tell you that he intended to stay here permanently?

A. No

Q. Okay. Was it you understanding from talking with him that he always intended to return back to Michigan.

(See Exhibit 1, Motion Response, Sub-Exhibit D)

Deponent: CRYSTAL TYNER
Q. When did you first meet Arthur Krumm?

A. About Ten Years ago.

...

Q. And did you ever talk with him about where he lived or where he was from or anything such as that?

A. From Michigan.

...

Q. Where did he say home was?

A. In Michigan.

Q. Did he tell you where in Michigan?

A. With his grandmother. He gave us the addresses and phone number. All his contact information.

Q. Did you initiate the call?

A. Uh-huh.

Q. Do you know who's house you were calling?

A. Beverly's

Q. How did you know that was Beverly's?

...

A. That's where I always called him at was Beverly's home.

***11** ...

Q. Was there a time in May that you had a conversation with Arthur about going to Arkansas to pick up Scott Barber's Children?

A. Yes.

Q. When was that and what was the nature of that conversation?

A. He had called and was ready to leave Arkansas. He was done with whatever it was he was doing there and wanted to come visit with us for a while **before he went back home to Michigan.** He ran across the idea of bringing Scott Barber's daughter back with him and I spoke to Scott Barber and he asked me to do that and I did.

(See Exhibit 1, Motion Response, Sub-Exhibit E)

DEPONENT: TONYA KRUMM
Q. Okay. As you sit here today, is it your understanding that Artie still has possessions, that you know of at the Beverly Krumm household?

A. They're still there.

...

Q. Was it your understanding and your belief that Artie always intended to return back to Michigan.

A. Yes.

Q. Is it your belief and understanding that Artie always considered Michigan his Home?

A. Yes.

Q. Am I correct in understanding that you came down south just to follow Artie because he was your husband at the time?

A. Yes.

Q. Okay. Do you consider Michigan your home?

A. Yes.

Q. Do you plan on going back to Michigan when you can?

***12** A. Yes.

(See Exhibit 1, Motion Response, Sub-Exhibit J, Deposition of Tonya Krumm)

In addition to his clear **intent** to return to his Grandmother's in Michigan, nearly every single factor enumerated by the courts as relevant to determining domicile, and thus "material," lead to the same conclusion; Mr. Krumm was domiciled at 5529 Lund Rd, Fife Lake Michigan, in the home of Beverley Krumm. In Response to Defendant's motion before the trial court, Plaintiff-Appellees proffered the following evidence:
• The relationship between the injured and the insured was that of parent and child. Beverly Krumm and her late husband legally adopted Arthur when he was a child, and Beverly Krumm testified it was her opinion that he still lived in her home at the time of the accident. (See Exhibit 1, Motion Response, Sub-Exhibit B, p. 62)

• Arthur Krumm's grandmother, sister, and estranged wife all testified that he had a **bedroom** containing his belongings at 5529 Lund Rd. (See Exhibit 1, Motion Response, Sub-Exhibit B, p. 40, 67-68, Sub-Exhibit G, pp. 45- 48, and Sub-Exhibit J, pp. 17-24 & 95)

• Even if (and it's a big if) Arthur could be said to have been living with his estranged wife in Arkansas at some time in early 2003, she had been evicted from the only address she actually had in Arkansas in mid April, so on the date of the accident, **there really was no other address at which Mr. Krumm could have claimed domicile.** Defendant-Appellant now claims he was returning to the home of Janice Stunkel, but besides her recorded statement, there is no evidence linking him to her home.

• Arthur Krumm continued to receive mail at his grandmother's, including collection notices for accounts on which he had listed his home address as 5529 Lund Rd. Fife Lake Michigan. (See Exhibit 1, Motion Response, Sub- Exhibit K, Mail)

• His possessions, i.e. his bed, his model tractor collection, his gun, stereo equipment, tools, TV, video collection, and clothes, minus what he carried with him in a duffel bag, were in his room, at his grandmother's. (See Exhibit 1, Motion Response, Sub-Exhibit B, p. 40, 67-68, Sub-Exhibit G, pp. 45-48, and ***13** Sub-Exhibit J, pp. 17-24).

• His only ID, a **Michigan** ID and his active voter's registration listed his address as 5529 Lund Rd. Fife Lake Michigan. (See Exhibit 1, Motion Response, Sub-Exhibit L, ID Card, and Sub-Exhibit M, Report with Voters Registration Info from Defendant-Appellants' own claim file.)

• The last time Artie was involved in a criminal matter in Michigan before his accident,(which was in 2002) the police listed his address as 5529 Lund Rd. (See Exhibit 1, Motion Response, Sub-Exhibit N, MI. State Police File)

The only factor identified in the relevant case law that doesn't weigh in favor of Arthur Krumm being domiciled with Beverly Krumm is **financial** dependence; which is really inapplicable in this case given that Arthur Krumm was an able bodied 29-year-old man at the time of the accident. It is to be expected that he was not **financially** dependant on his **elderly** grandmother.

In attempting to sway the trial court Defendant-Appellant muddied the waters with evidence of Mr. Krumm's extensive Michigan criminal record and the **story** of Tonya Lynn Krumm's alleged residential history in Michigan in the years before the accident. (A story, that if you read her deposition in its entirety, she herself can't even keep straight). Defendant-Appellant included the information in an effort to convince the trial court that Mr. Krumm resided with his wife on the dates in question, however, although Plaintiff-Appellees do not dispute that they were legally married, Tonya and Arthur were on again, off again, and definitely **not** your average married couple. In fact, friends and family have testified that they never even knew they were married! That issue aside, Plaintiff-Appellees assert that the Defendant's take on the evidence was both false and irrelevant.

Defendant-Appellant in its motion, repeatedly referenced Mr. Krumm's Michigan Criminal record. They asserted that on 9 separate occasions, spanning the years 1999 - 2002 ***14** Mr. Krumm was shown to live at an address other than 5529 Lund Rd, Fife Lake, MI. However, careful review of the documents reveals that this is simply not true. Although some of the documents indicate Mr. Krumm's presence at an alternate address, when his formal information is recorded for the purpose of issuing citations etc., his address is listed as 5529 Lund. Even if the records did clearly indicate that Mr. Krumm was not residing with his Grandmother at those particular times, **where he lived in 1999 or even 2002 is irrelevant to determining his domicile on May 17, 2003.**

Defendant-Appellant moved on in an attempt to convince the Court that Mr. Krumm had established permanent residence in Arkansas. They began by stating that he moved to Arkansas in April of 2002, and opened a checking account. While it is true that Mr. Krumm opened a checking account in Arkansas on **June** 28, 2002, he did so using his **Michigan ID.** (See Exhibit 1, Motion Response, Sub-Exhibit P, Bank Records) Defendant-Appellant further pointed out that Mr. Krumm's Michigan account was deemed dormant by July 2002, and thus he must have been living in Arkansas... This information becomes a double edged sword if Defendant-Appellant was trying to assert that the existence of a checking account determines domicile, as the Arkansas account was officially **closed** in March of 2003 in anticipation of Arthur Krumm's return to Michigan. (And following the filing of 26 Affidavits of Fraud against estranged wife Tonya Lynn Krumm, in response to her stealing his checkbook and writing a slue of bad checks.) As it turns out, the only bank account actually open on the date of the accident (although dormant) was his **Michigan account, an account that he intentionally left open as Michigan was his home.**

Defendant-Appellant then tells of how in September of 2002 Tonya Krumm moved to ***15** Arkansas and she and Arthur began living together, ending up in a rented structure located on Pump Station Road in Fayetteville. Defendant-Appellant points to various police reports and an investigation report produced in response to a fire that occurred at that address, listing Arthur as an occupant of the house. However, **the rental agreement for the premises signed in September of 2002, bears one name and one name only, that of Tonya Lynn Krumm.** (See Exhibit 1, Motion Response, Sub-Exhibit O, Court Documents for Eviction)

Arthur's co-workers/friends, Bill Duhaime, and Larry Corbitt have both testified that Arthur never “lived” anywhere while staying in Arkansas, that although he may have spent a few nights with Tonya, he was all over the place. (See Exhibit 1, Motion Response, Sub-Exhibits C & D) Tonya's own adult daughter, Crystal Sylva, testified that when she visited her mother shortly after Christmas 2002, at the Pump Station address, she did **not** think that Arthur was living there. She testified that Arthur wasn't around much. He and a friend showed up at the house on one occasion, **to see her,** but that he did not stay the night. (See Exhibit 1, Motion Response, Sub-Exhibit Q, pp. 53-54)

The reality of the situation was that every time Arthur can be affirmatively placed at the pump station address ranting about how its his place, he was drunk and there was trouble. The likely truth is that he never lived in the house, but would make social calls when he was liquored up and the urge struck him so to speak, taking off again when he was sober. Arthur may have helped Tonya get utilities set up only because she had no job (selling drugs doesn't count as income for purposes of establishing a utilities account), and she had brought children with her (none of them his).

The dispute about whether or not Arthur was living with his estranged wife in Arkansas ***16** could go on and on, however it is really neither here nor there, because even if he had been living with Tonya at one point, she was evicted by the owner of the house through formal court proceedings in April of 2003, weeks before the accident occurred. (Exhibit 1, Motion Response, Sub-Exhibit O) All Defendant-Appellant managed to do is establish that Arthur was in Arkansas for a period of time before the accident occurred, a fact that is not disputed by the Plaintiff-Appellees.

Plaintiff-Appellees claimed that the testimony of Tonya Krumm only lends favor to the notion that Arthur had abandoned any domicile he may have had in Arkansas. She testified that in April 2003, Arthur left, and was staying with various friends, talking to people in North Carolina and trying to get back to Michigan. “He kept telling me he was going to go back to Michigan.” (See

Exhibit 1, Motion Response, Sub-Exhibit J, pp 88-89) Because Arthur did not own a vehicle at that time, it took a little effort to work out the details. But clearly he cannot be said to have been domiciled at the pump station address at the time of the accident.

Defendant-Appellant's motion finally progressed to the relevant information, the days immediately preceding the accident, and Arthur's intent when he left Arkansas and traveled into North Carolina. Defendant-Appellant took the position that from the time he was evicted from the Pump Station address in April of 2003 until he left for North Carolina he was staying with a lady named Janice Stunkel (sister of his friend and co-worker Larry Corbitt). Defendant presents a signed statement from Ms. Stunkel stating that Crystal Tyner picked Arthur and Sarah up from her house to take them to North Carolina, and that a few nights later a **drunken** Arthur called her up and told her, "it wasn't working out, he was coming home." She **assumed** home meant Arkansas, because it wouldn't make sense for him to call her to tell her he was going back to ***17** Michigan... **Based on this statement, (not a deposition where Plaintiffs' attorneys could cross examine the witness) and this statement alone, Defendant-Appellant argued that reasonable minds could not possibly differ on the fact that Arthur Krumm was clearly domiciled with Janice Stunkel in Arkansas at the time of the accident; and that summary disposition should be granted in favor of the Defendant.**

Plaintiff-Appellees argued that one drunken statement to a friend several days before the accident does not establish domicile, particularly when at least four others, Crystal Tyner, Scott Barber, Larry Corbitt, and Tonya Krumm testified, **under oath,** where they were cross examined by Defendant's attorney, that Arthur was on his way back to Michigan, to his Grandmother's, by way of North Carolina. (See Exhibit 1, Motion Response, Sub-Exhibit E, Deposition of Crystal Tyner p. 17; Sub-Exhibit A, Deposition of Scott Barber p. 27; Sub-Exhibit D, Deposition of Larry Corbitt, pp. 27-28; and Sub-Exhibit J, Deposition of Tonya Krumm, pp. 88-89.

Defendant-Appellant concluded its argument with an attempt to convince the trial court that the only evidence Plaintiff-Appellees can proffer in support of the notion that Arthur was domiciled with Beverly Krumm are "baseless and inadmissable assertions of opinion by lay witnesses with a **financial** interest in seeing that no-fault benefits continue," and obviously that is not true. The only people with a **financial** interest in this case are Plaintiff-Appellees and the LIP, Arthur Krumm. The evidence presented by Plaintiff-Appellees in response to the motion is just as admissible as any presented by Defendant-Appellant, and includes testimony given under oath by people with personal knowledge of fact and events, as well as business records, and other documents, **some of which where produced as a result of Defendant-Appellant's own *18 extensive professional investigation, the results of which are located in the Defendant's Claim File.**

Clearly, there exist issues of material fact precluding a proper grant of summary disposition. In the Motion for Summary Disposition, Defendant-Appellant pieced together a possible version of events. Plaintiff-Appellees produced admissible evidence to counter their version of events, creating questions of material fact. Everyone must be domiciled somewhere. Arthur Krumm was not homeless on the date of the accident. He had an address that was his legal domicile. It is simply ridiculous to say that reasonable minds could not differ on where Arthur Krumm was domiciled on the date of the accident. Thus, Defendant was not entitled to summary disposition on the issue, and the Court of Appeals acted appropriately in reversing the decision of Judge Murphy.

B. DETERMINATION OF DOMICILE IS A QUESTION OF FACT FOR A JURY UNLESS THE UNDERLYING FACTS ARE UNDISPUTED WHEREIN IT BECOMES A QUESTION OF LAW.

Domicile is a **question of fact** to be determined by the jury unless the underlying facts are not in dispute. *Fowler v Auto Club Ins Assoc*, 254 Mich App 362, 656 NW2d 856 (2002). Clearly, as is evidenced by Plaintiff-Appellants' previous argument: in the case of Arthur Krumm the underlying facts are vehemently disputed. Because Plaintiff-Appellees, and Defendant-Appellant both presented evidence that could establish Mr. Krumm's domicile, and the relevant evidence is largely subject to a determination of credibility, the trial court was not in a position to take the question away from a jury.

Defendant-Appellant forwarded the idea, that Arthur Krumm had been living in Arkansas for a number of months before the accident. That although he had traveled to North ***19** Carolina, he intended to return to Arkansas to continue living there. They argued that he had lived outside the confines of his grandmother's house at several points during his adult life and thus it should be assumed that he was living with his legal wife, Tonya Krumm, and was not entitled to benefits under his Grandmother's policy. To prove their theory of domicile, they presented evidence confirming his presence in Arkansas on a number of occasions, evidence that he had opened a checking account and had paid bills there, and that at least one person, heard him say he was coming back to Arkansas after he entered North Carolina. Additionally, they relied largely on the intuitive notion that a 29-year-old, married-man, should not be considered to live with his Grandmother.

In contrast, Plaintiff-Appellees, with admissible evidence of their own, forwarded the theory that although Arthur Krumm had been in Arkansas prior to the accident, he had severed ties, including his bank account and suspected place of residence, and had indicated to multiple individuals that he was returning to Michigan. Plaintiff-Appellees presented additional evidence that although Arthur may have left on occasion, he always returned to the home of his grandmother, Beverly Krumm, and she believed he was returning at the time of the accident. He kept almost all his belongings in her home, and had a room there. His ID and voter's registration listed her address as his own, and he received mail and telephone calls there.

What it amounted to was this: two different stories; both supported by some degree of evidence; thus an issue to be decided by a jury. The trial court wrongfully inserted its own judgment, taking the affidavit of Janice Stunkel presented by Defendant-Appellee, as more probative on the issue of where Mr. Krumm was headed, than four sets of deposition testimony presented by the Plaintiff-Appellants. The trial court drew a weak distinction between this case ***20** and the *Williams v State Farm*, 202 Mich App 491, 509 NW2d 821 (1993), stating that Arthur was not actually returning to a parents home. (See Transcript of Hearing, p. 16) A false statement by any account as Arthur was legally adopted by Beverly Krumm and her husband, and had known them as his parents from the age of four. Lastly, the trial court even went so far as to come up with a completely new argument, that a jury could find Arthur Krumm was domiciled in North Carolina at the time of the accident, a proposition that neither party furthered. (See Transcript of Hearing, p. 17)

Clearly the trial court overstepped its limited role as fact finder, placing all evidence in a light most favorable to the Defendant, and committed reversible error in granting Defendant's motion for summary disposition. The Court of Appeals did not decide any issues of fact or law as they relate to domicile, but only determined that the trial court judge should not have inserted his own judgment in place of that of a jury's when the facts of this case are highly disputed. This is the right result given all the evidence before the trial court.

RELIEF

Defendant-Appellant's Application for leave to appeal fails to show the required grounds for review by this Court. Further, when issues of material fact are in dispute, domicile is to be decided by a jury, and the Court of Appeals reached the proper result in reversing the trial court's dismissal of this case based on the issue. Accordingly, this Court should deny Defendant-Appellant's application for leave to appeal, or alternatively, affirm the decision of the Court of Appeals.

Appendix not available.

Footnotes

1 The March 24, 2009 Opinion of the Court of Appeals is included in Defendant-Appellant's Application for Leave to Appeal as **Exhibit D.**

2 The transcript of the July 20, 2007 summary Disposition Hearing is included in Defendant-Appellant's Application for Leave to Appeal as **Exhibit A.**

3 The July 30, 2007 Order of Dismissal in included in Defendant - Appellant's Application for Leave to Appeal as **Exhibit B.**

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